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Opinion on transfer from Supreme Court

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JERRY LEE HILL, Defendant and Appellant.	A097724 (Solano County Super. Ct. No. FC191162)

Defendant appeals following a conviction for receiving stolen property. He contends, among other things, that the search of his motel room was unlawful because the police were unaware of his probation search condition. After we affirmed this conviction, (*People v. Hill*, (Mar. 28, 2003, A097724)[nonpub. opn.]), the California Supreme Court granted review and held the matter pending its decision in *People v. Sanders* (2003) 31 Cal.4th 318. The Supreme Court then transferred the case back to us with directions to vacate our decision and reconsider the cause in light of *Sanders*. We again conclude the search was lawful and affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Following a plea agreement, defendant's girlfriend Jamie Gregory testified that on March 17, 2001, defendant asked her to help him burglarize the home of her friend Patricia Bond. When Gregory refused, defendant struck her in the face with an auto part, breaking her nose. Defendant took her to the emergency room, where Gregory told the triage nurse that she was struck with a metal baseball bat while trying to break up a fight.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, Sections II and III are not certified for publication.

The next morning, defendant told Gregory he would kill her if she did not help with the burglary. Gregory called Bond between 8:30 and 9:00 a.m. to determine if she was home. Gregory appeared surprised that Bond had not yet left for church. Bond was suspicious because Gregory was living in a car and had recently asked Bond for money. Bond left home, locking the doors. While Bond was gone, Gregory entered the house through a rear window and admitted defendant through a sliding glass door. They took jewelry, coins, a DVD player, VCR, tools and other items. After defendant sold some of Bond's property, he and Gregory checked into a motel.

Discovering the burglary upon her return, Bond called the police and Officer Moore responded. Based on Bond's report, Moore considered Gregory a suspect and went to the motel parking lot where Gregory's car had been located. Gregory walked toward the car and Moore approached, saying he was investigating a burglary. Gregory said she was with defendant, who was inside the room taking a shower. Although Moore noted facial injuries and several lacerations on Gregory's nose, Gregory did not appear to be afraid of defendant. Gregory reentered the motel room, and spoke with defendant near the bathroom door. Moore later searched the room and recovered some of Bond's jewelry and silver dollars hidden under the bathroom sink and behind the toilet. He found other stolen property in dresser drawers. Moore did not recover Bond's DVD player or VCR, which defendant had already sold. After his arrest, defendant said he could not be charged with a burglary, claiming he did not enter the house. He also asked, "If I help you get the other property back, can we work some kind of deal to help [Gregory] out?" He said, "[I]f I could get some kind of guarantee for her . . . I could help you guys out and get the rest of that property back." Defendant's niece and a friend testified that Gregory injured her face when she fell on an auto part while defendant was fixing her car. Another friend testified that Gregory approached her several weeks before the burglary and tried to sell her a ring, contradicting Gregory's testimony that she was not selling jewelry at that time.

The jury convicted defendant of receiving stolen property, but found him not guilty of burglary. The court found the defendant's prior conviction had not been proven. Defendant was sentenced to three years in prison.

DISCUSSION

I. *Motion to Suppress*

The trial court denied defendant's motion to suppress his statements to Officer Moore and the evidence seized in the motel room. Applying *In re Tyrell J.* (1994) 8 Cal.4th 68, the court found that because defendant was on probation he had no reasonable expectation of privacy. Defendant claims the trial court erred because Moore had been erroneously informed that defendant was on parole, and did not learn that defendant was on probation with a search condition until after the search had taken place.[1] In supplemental briefing, defendant argues that the Supreme Court's decision in *Sanders*, *supra*, 31 Cal.4th 318, "establishes once and for all that the search may not be validated as a probation search after the fact." *Sanders* is distinguishable.

A. *Additional Factual Background*

At the suppression hearing, Moore testified that Bond identified both Gregory and "her boyfriend" as possible suspects. Later that morning, Moore contacted Gregory at the motel where her car had been discovered. Gregory, who was standing outside the door of her motel room, admitted she was staying at the motel with her boyfriend. Gregory refused Moore's request to search the room. As Gregory walked back inside, Moore saw defendant in the room and asked Gregory if he could speak with defendant. Through a crack in the door, Moore watched as Gregory stood at the bathroom door and whispered to defendant. Defendant came outside and confirmed that he was Gregory's boyfriend. Moore could not recall if he asked defendant for permission to search.

Moore radioed the police dispatcher and asked whether Gregory or defendant was on probation. The dispatcher erroneously told him no. Defendant was, in fact, on

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[1] The terms of defendant's probation search condition are not described in the record. Defendant stipulated that he was on probation at the time of the search and does not dispute that he was subject to a condition allowing law enforcement officers to search his residence.

probation. Moore began the process of obtaining a search warrant by calling his patrol supervisor who came to the scene and in turn called a sergeant of investigations.[2] The sergeant then called a detective to actually write the search warrant. While awaiting the detective's arrival, Moore received another call from the dispatcher who again erroneously advised him that defendant was on parole. Moore testified that dispatchers previously relied on a computer-generated printout that listed only the names of active parolees. At some point, the printout was changed to include both active and inactive parolees, with a letter code distinguishing them. Apparently, the dispatcher misread the printout. Relying on this misreport of defendant's active parole status, Moore searched the motel room and found the victim's property. About two days later, Moore learned that defendant's parole had expired, but that defendant was, indeed, on probation with a search condition.

B. *Analysis*

In our original opinion, we relied on the reasoning of *In re Tyrell J.*, *supra*, 8 Cal.4th 68 (*Tyrell J.*) and concluded the search was lawful because defendant was a probationer subject to police search condition, even though Officer Moore was unaware of defendant's probationary status at the time of the search. The *Sanders* court, however, declined to apply the reasoning of *Tyrell J.* to residential searches involving adult parolees. The court expressly rejected the notion that it is irrelevant whether police have contemporaneous awareness of a search condition. (*Sanders*, *supra*, 31 Cal.4th at p. 322.)

In *Sanders*, *supra*, police officers discovered cocaine during an unlawful protective sweep of a residence shared by two defendants. (31 Cal.4th at pp. 322-323.) Subsequently, an officer contacted the police department and learned that one of the defendants, McDaniel, was on parole with a search condition. The officer then conducted

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2 Moore's disjointed direct examination makes it difficult to determine the precise sequence of events. Defendant's appellate counsel recites that Moore inquired about the probation status *after* he initiated the warrant process. This discrepancy is of no consequence. In this case it is the officer's conduct, not the sequence, that is dispositive.

a parole search of the residence and seized the cocaine. (*Id*. at p. 323.) The Supreme Court concluded the search was unlawful as to defendant Sanders who was not subject to a search condition. It then turned to the "more difficult question" of whether the search was also unlawful as to McDaniel. (*Id.* at p. 331.) The court considered the totality of the circumstances, "with two salient circumstances being McDaniel's parole search condition and the officer's lack of knowledge of that condition." (*Id.* at p. 333.)

The court emphasized that while a parolee's expectation of privacy is diminished, it is not eliminated. (*Sanders*, *supra*, 31 Cal.4th at p. 332.) Relying on its analysis in *People v. Reyes* (1998) 19 Cal.4th 743, 754, the court observed, "[W]hether the parolee has a reasonable expectation of privacy is inextricably linked to whether the search was reasonable. A law enforcement officer who is aware that a suspect is on parole and subject to a search condition may act reasonably in conducting a parole search even in the absence of a particularized suspicion of criminal activity, and such a search does not violate any expectation of privacy of the parolee." (*Sanders*, *supra*, at p. 333.) The court cautioned, "But our reasoning in *Reyes* does not apply if the officer is unaware that the suspect is on parole and subject to a search condition. Despite the parolee's diminished expectation of privacy, such a search cannot be justified as a parole search, because the officer is not acting pursuant to the conditions of parole." (*Ibid.*) The court concluded, "[W]e hold that an otherwise unlawful search of the residence of an adult parolee may not be justified by the circumstance that the suspect was subject to a search condition of which the law enforcement officers were unaware when the search was conducted." (*Id*. at p. 335, fn. omitted.)

The *Sanders* court rested its analysis on the deterrent effect of the exclusionary rule. Its conclusion "flows from the rule that whether a search is reasonable must be determined based upon the circumstances known to the officer when the search is conducted and is consistent with the primary purpose of the exclusionary rule—to deter police misconduct." (*Sanders*, *supra*, 31 Cal.4th at p. 332.) The court also observed that the exclusionary rule serves to preserve judicial integrity. Quoting *Terry v. Ohio* (1968) 392 U.S. 1, 12, the *Sanders* court stressed, " 'Courts which sit under our Constitution

cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.' " (*Sanders*, *supra*, at p. 334.)

Finally, the *Sanders* court also noted that suppressing the evidence in these circumstances protects the rights of the parolee's inhabitants and guests. (*Sanders*, *supra*, 31 Cal.4th at p. 335.) "Permitting evidence that has been suppressed as to a cohabitant to be used against the parolee would encourage searches that violate the rights of cohabitants and guests by rewarding police for conducting an unlawful search of a residence." (*Ibid*.)

At the outset, the Attorney General contends that *Sanders* does not apply because defendant here was on probation, not parole. Relying on *People v. Bravo* (1987) 43 Cal.3d 600, 608, the Attorney General argues that a probationer consents to warrantless searches and seizures in exchange for the opportunity to avoid prison. As the *Bravo* court held, the acceptance of a probation search condition constitutes "a complete waiver of [the] probationer's Fourth Amendment rights." (*Id.* at p. 607.) By contrast, no waiver theory was applicable in *Sanders* because the search condition was imposed as a condition of parole, which the parolee could not refuse. (*Sanders*, *supra*, 31 Cal.4th at p. 329, fn. 3.) We need not resolve this issue, however, because we conclude that *Sanders* is distinguishable on other grounds.

In examining the "totality of the circumstances," the *Sanders* court identified the "salient circumstances" before to be McDaniel's parole search condition and the officer's ignorance of that condition. (*Sanders*, *supra*, 31 Cal.4th at p. 333.) By contrast, the "salient circumstances" here are more complex. Moore's conduct was not that of an officer unlawfully invading a residence, and then seeking to justify his conduct by a belatedly discovered search condition. Moore took all the proper steps to ensure that his search of the motel room was lawful. He first asked for consent. When refused, Moore contacted the dispatcher to determine if defendant or Gregory was on probation. Defendant was indeed on probation, but, for unexplained reasons, the dispatcher reported to the contrary. Moore then dutifully began the process of securing a search warrant. As

he waited for the warrant to be prepared and approved, the dispatcher contacted Moore with more misinformation. This time the dispatcher erroneously informed him that defendant was on parole. Only then did Moore enter and search the room.

We are mindful that erroneous parole status information will not validate an otherwise unlawful search. "[T]he good faith exception does not apply where law enforcement is collectively at fault for an inaccurate record that results in an unconstitutional search." (*People v. Willis* (2002) 28 Cal.4th 22, 49.) The *Willis* court noted that its "collective knowledge principle" is consistent with other high courts' decisions and specifically quoted *State v. Mayorga* (Tex.App. 1996) 938 S.W.2d 81, 83 (*Mayorga*), concerning incorrect information provided by a dispatcher: "[P]olice dispatchers are in continuous radio contact with the officers on duty. They are adjuncts to the law enforcement team with a stake in the outcome of criminal prosecution. They directly provide the warrant information upon which an officer in the field depends to make an arrest; their misconduct or carelessness can be significantly affected by the threat of exclusion. Because we recognize the exclusionary rule as an important tool to help prevent impingement on Fourth Amendment rights, we decline to create another exception to the rule for errors caused by police personnel." (*Mayorga*, *supra*, at pp. 83-84.)

Under the "collective knowledge principle" discussed in *Willis*, the evidence would have been excluded if defendant's erroneously reported parole status had been the only basis for the search. In examining the totality of the circumstances, however, we cannot turn a blind eye to the undisputed fact that defendant was actually on probation and consented to a search condition. But for the dispatcher's misinformation to the contrary, Moore would have searched defendant's motel room on the basis of that valid search condition.

While *Sanders* precludes an officer from justifying a search by later-acquired knowledge of the suspect's parole status, the circumstances of defendant's search represent a variation on that theme. For example, if the dispatcher had misspoken at the outset, incorrectly stating that defendant was on parole when in fact he was on probation,

suppression of the evidence would serve no deterrent purpose. In such a situation, the dispatcher's error would produce "no impingement on Fourth Amendment rights." (*Mayorga*, *supra*, 983 S.W.2d at p. 84.) Nor would " 'judicial integrity' " be impugned in upholding the search. (See *Sanders*, *supra*, 31 Cal.4th at p. 334.) While the exclusionary rule exists to safeguard Fourth Amendment rights, it should not devolve into a game, the outcome of which depends on a terminological discrepancy.

Here, the officer believed he was conducting a parole search when in fact defendant was on probation and had waived his Fourth Amendment privacy rights, except for freedom from arbitrary or harassing searches. Applying the same "totality of the circumstances" test employed by the *Sanders* court, we cannot conclude that the exclusionary rule dictates suppression of the evidence. The exclusionary rule serves "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." (*Mapp v. Ohio* (1961) 367 U.S. 643, 656.) Nothing in this officer's conduct manifests any such disregard. Moore's actions do not present us with the danger of "legitimiz[ing] unlawful police misconduct." (*Sanders*, *supra*, 31 Cal.4th at p. 335.) To punish the responsible officer and the inept dispatcher in these circumstances creates a windfall for the defendant who was legitimately subject to a search condition. Therefore, after considering *Sanders*, we again conclude the trial court did not err in denying defendant's motion to suppress.

II. *Corroboration of the Accomplice's Testimony*

Defendant contends that Gregory's uncorroborated accomplice testimony was insufficient to support his conviction for receiving stolen property. The argument fails.

Defendant has waived this issue by conceding at trial the existence of sufficient corroboration. After the prosecution rested, the court, on its own, questioned the sufficiency of corroborative evidence. In response, defense counsel referred to defendant's statement that he could help the police by getting Bond's remaining property for them. Defense counsel told the court: "I believe that that would be sufficient corroboration for the receiving [stolen property] charge, but I don't believe it's sufficient

corroboration as to the burglary charge." Nevertheless, the court found that Gregory's testimony was corroborated on the burglary count.

In closing argument, counsel again conceded the sufficiency of the evidence on the receiving stolen property count: "[T]here's evidence that he received stolen property, and it doesn't depend on the testimony of Jamie Gregory. I thought that counsel made a good point of that with her argument that he's in the bathroom where much of the stuff is located that came from the house. Well, that's evidence that you can consider on this count of receiving stolen property. Doesn't prove he stole it, but it sure proves that he's in a place where he's . . . apparently got control over it, got some knowledge that it's there."

Even without defendant's concession, his claim of insufficient corroboration is without merit. A conviction cannot be based solely on accomplice testimony. (Pen. Code, § 1111.) There must be sufficient corroborating evidence that tends "to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (*Ibid.*) To adequately corroborate accomplice testimony, the prosecution must " 'produce independent evidence which, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged. [Citation.]' [Citation.]" (*People v. Rodriques* (1994) 8 Cal.4th 1060, 1128.) The nature and extent of corroboration required is not great. "Corroborating evidence may be circumstantial in nature, and may consist of evidence of the defendant's conduct or his declarations." (*People v. Garrison* (1989) 47 Cal.3d 746, 773.) "[C]orroborative evidence is sufficient even though slight and entitled to little consideration when standing alone. [Citation.]" (*People v. Wood* (1961) 192 Cal.App.2d 393, 396.) "Only a portion of the accomplice's testimony need be corroborated, and the corroborative evidence need not establish every element of the offense charged. [Citation.] All that is required is that the evidence connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the [accomplice] is telling the truth. [Citation.]" (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 25, internal quotation marks omitted.) In determining the

sufficiency of corroborative evidence we must view the evidence in the light most favorable to the verdict and uphold the trial court's disposition if, on the evidentiary record, the jury's determination is reasonable. (*People v. Garrison*, *supra*, 47 Cal.3d at p. 774.)

A conviction for stolen property requires proof that the property was stolen, and the defendant possessed it knowing it was stolen. (Pen. Code, § 496, subd. (a).) Hours after the burglary, defendant was in the motel room where Bond's stolen property was hidden. After Moore recovered Bond's property, defendant told Moore that he could not be charged with burglary since he did not actually enter the house. He also told Moore that he would help get Bond's remaining property if his assistance would help Gregory. Defendant's statements indicate knowledge of both the burglary and the stolen character of the property.

Moreover, when Moore initially contacted Gregory at the motel, she told him that defendant was inside taking a shower. Moore then watched as Gregory went inside the room and talked to defendant near the bathroom door. When Moore later entered the bathroom to search it, he discovered Bond's stolen jewelry hidden in a wet towel underneath the sink and her silver coins hidden at the rear of the toilet. This evidence supports an inference that that defendant concealed the property while Moore was outside the room with Gregory.

This evidence clearly tends to connect defendant to the commission of the crime of which he has been convicted. (*People v. Garrison*, *supra*, 47 Cal.3d at p. 774.) Gregory's testimony was sufficiently corroborated and properly admitted. The jury's verdict was supported by sufficient evidence.

III. *Ineffective Assistance of Counsel*

Defendant's last contention is that his trial counsel was ineffective for failing to move to dismiss the receiving stolen property charge based on insufficient accomplice corroboration. The argument founders on the shoals of our analysis in Section II.

DISPOSITION

The judgment is affirmed.

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Corrigan, Acting P.J.

We concur:

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Parrilli, J.

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Pollak, J.

Trial court:	Solano County Superior Court
Trial judge:	Honorable Harry Kinnicutt

Gail Harper for Appellant and Plaintiff.

Bill Lockyer, Robert R. Anderson, Ronald A. Bass, Eric D. Share, Ryan B. McCarroll, for Defendant and Respondent.